No. 86-1110

In the Supreme Court of the United States

OCTOBER TERM, 1986

ENTERPRISE TOOLS, INC. AND
E. B. BENNETT, PETITIONERS

v.

EXPORT-IMPORT BANK OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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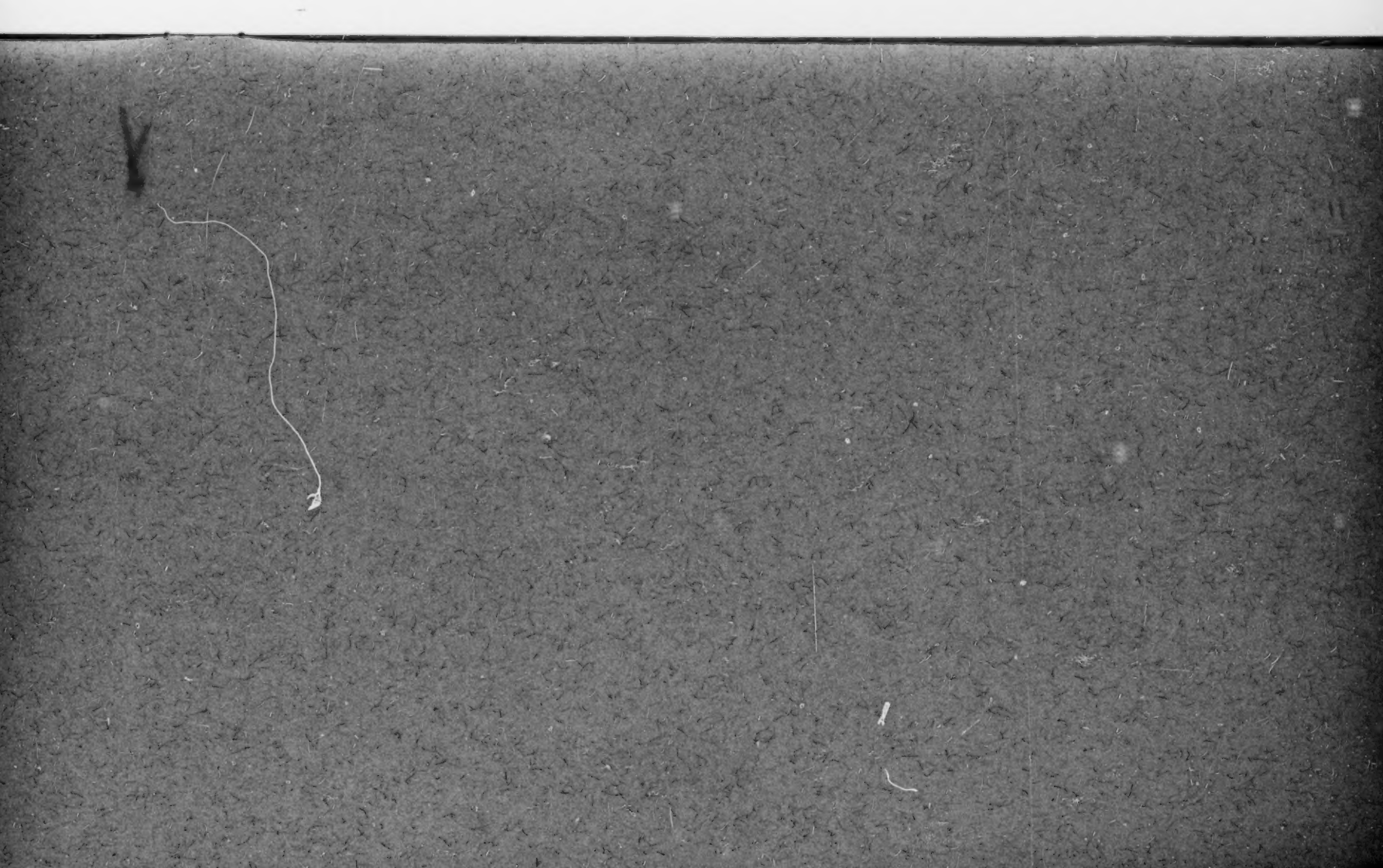

TABLE OF AUTHORITIES

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Petitioners contend that the court below applied an improper standard of review in setting aside the district court's determination that their insurance policy with respondent covers certain trucks that the Mexican government expropriated.

1. Petitioners, E.B. Bennett and his wholly owned company, Enterprise Tools, Inc., provide petroleum hauling services for oil-producing companies (Pet. App. 2a). In 1980, they contracted with Petroleos Mexicanos (Pemex), the Mexican government's wholly owned oil-producing company, to haul liquified petroleum gas between Pemex's refinery and two cities in Mexico (*id.* at 2a-3a, 2d). Petitioners purchased a "comprehensive services export credit insurance policy" from respondent, the Export-Import Bank of the United States (Eximbank), in connection with these petroleum hauling operations (*id.* at 2a).

Within a year after petitioners purchased this policy and began hauling petroleum products for Pemex, the Mexican government seized and expropriated six of petitioner's trucks (Pet. App. 3a, 7c). When petitioners were unable to secure return of the vehicles, they filed a claim with Eximbank under the aforementioned insurance policy to recover the value of the trucks (*id.* at 3a). Eximbank denied petitioners' claim, stating that the insurance policy covers only credit losses caused by expropriation or other hazards, and does not cover the value of assets that are themselves expropriated by a foreign government (*id.* at 3a-4a).

Petitioners instituted this action against Eximbank in the United States District Court for the Eastern District of Arkansas seeking to recover the value of the expropriated trucks. After a trial, the district court found that "the policy of insurance here involved is ambiguous, contradictory and misleading" (Pet. App. 10c). The court ultimately concluded that petitioners' confiscated trucks were "covered under the 'political risk' portion of the defendant's policy of insurance" (*id.* at 9c-10c).[1]

The court of appeals reversed, concluding that "the policy did not provide coverage for the value of the insured's confiscated equipment" (Pet. App. 4a). The court began its analysis by describing the principles of interpretation that "apply to the construction of insurance policies" (*ibid.*). It observed that "resort to extrinsic evidence is appropriate to resolve ambiguities." It added,

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[1] The district court did not issue a written opinion in this case. Rather, it partially adopted petitioners' proposed findings of fact and made some contemporaneous remarks from the bench. Petitioners have reprinted some of these findings and remarks in Appendix C to their petition for a writ of certiorari. We note, however, that the titles, "Finding[s] of Fact and Conclusions of Law" and "Finding[s] of Fact," which appear at Pet. App. 1c and 5c, do not appear in the transcript. They have been added by petitioners.

however, that the question "[w]hether an insurance contract is ambiguous is a question of law. Policy language is ambiguous if it is 'reasonably susceptible of two interpretations' " (*id.* at 4a-5a (citation omitted)). But "where a term is defined in the policy, the court is bound by the policy definition" (*id.* at 5a). Thus, "[w]hile ambiguities are to be construed in favor of the insured," the court concluded, "a court may not rewrite the contract" (*ibid.*).

The court then applied these interpretative principles to petitioners' insurance policy with Eximbank. Pet. App. 5a-14a. It noted that the policy has two parts, one covering "commercial credit risks," the other covering "political risks" (*id.* at 5a). The "commercial credit risk" part of the policy, the court found, unambiguously indemnifies the insured only for unpaid contract payments (*id.* at 9a). The court stated that certain phrases in the "political risk" part of the policy, viewed in isolation, "may be slightly ambiguous" in that they refer to "equipment" and to "expropriation or confiscation" (*id.* at 12a). But the court held that "the key to the nature and extent of the insurer's liability," under both parts of the policy, "lies in the definition of 'loss,' " a term that is defined, for purposes of the policy generally, as the value of the "contract price" less certain offsets (*ibid.*). The court accordingly construed the "political risk" part of the policy to indemnify the insured, not against the loss of expropriated assets, but against the loss of contract payments occasioned when expropriation or other political hazard results in nonpayment of the contract price (*id.* at 12a-13a). This interpretation of the "political risk" part of the policy, the court observed, "is consistent with the character of coverage unambiguously established" in the "commercial credit risk" section (*id.* at 13a). Thus, "[c]onsidering the contract in its entirety" (*ibid.*), the court held that the policy covered only the insured's uncollectible accounts receivable and not its expropriated trucks.

The court further found that the extrinsic evidence in the record buttressed this conclusion. Pet. App. 14a-22a. It pointed out that "credit insurance policies typically cover only overdue or uncollectible accounts and do not provide asset protection coverage" (*id.* at 14a). Moreover, it noted that petitioners' "premiums bore absolutely no relationship to the value of the trucks to be used in hauling operations" (*id.* at 16a), and that "the policy limits were based on petitioners' anticipated billings, not on the value of equipment used in the insured transactions" (*ibid.*). By contrast, the court noted, petitioners' "insurance agent had received a quotation from a competing insurance group * * * which did offer expropriation insurance" and which "expressly tied [the annual premium and liability limits] to the value of the equipment" (*id.* at 17a). Finally, the court noted, Eximbank does not even "offer[] any policy covering the exporters' loss of plant or equipment" (*id.* at 19a).

Thus, "[h]aving considered the language of the insurance policy and the extrinsic evidence," the court of appeals concluded "that the district court erroneously interpreted the policy" (Pet. App. 21a-22a). Accordingly, it reversed and remanded with instructions that the case be dismissed with prejudice (*ibid.*). Chief Judge Lay concurred separately, finding that "the insurance policy terms unambiguously exclude from coverage the trucks seized by the Mexican government" (*id.* at 22a-23a).

2. The decision below is correct. It does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, review by this Court is not warranted.

a. Petitioners first contend (Pet. 9-16) that the decision below conflicts with this Court's decision in *Icicle Seafoods, Inc.* v. *Worthington*, No. 85-195 (Apr. 21, 1986). This contention is plainly wrong. The court of appeals there had held that the district court had applied an improper legal standard in determining that certain em-

ployees of a maritime company were "seamen" within the meaning of 29 U.S.C. 213(b)(6). Rather than remand the case so that the district court could apply the correct legal standard to the evidence in the record, however, the court of appeals independently reviewed the evidence and held, as a matter of fact, that the employees were industrial maintenance workers, and not seamen. This Court reversed, holding that the appellate court should have remanded the case so that the district court could have applied the correct legal standard to the evidence in the first instance. See slip op. 4-6.

Icicle Seafoods clearly has no bearing on this case. Here, the court of appeals did not make any independent factual findings. Rather, it reached an independent conclusion of law, to wit, that the Eximbank insurance policy unambiguously insures only accounts receivable, and not assets. Because the court of appeals' decision was grounded upon the language and structure of the policy, and because the construction of an unambiguous insurance policy is a question of law governed by a de novo standard of review, the *Icicle Seafoods* decision has nothing to do with this case.[2]

Even if the court of appeals' conclusion were thought to be factual in nature, hinging not upon appraisal of the policy's language but upon evaluation of extrinsic evidence, the decision below would still be correct under

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[2] Petitioners err in asserting (Pet. 16-18) that the court below invented a novel category of "slightly ambiguous" insurance policies. The court of appeals expressly acknowledged that there are only two types of policies: ambiguous and unambiguous. See Pet. App. 4a-5a. In determining which category the Eximbank policy fell into, the court said that some of the policy's "language may be slightly ambiguous," but held that other provisions of the policy clarified this ambiguity and that "a common sense reading" of the whole contract indicated that it insures only uncollectible accounts receivable. *Id.* at 13a-14a. This finding that the contract as a whole is "unambiguous" makes the interpretation of the policy a question of law. *Ibid.*

Icicle Seafoods. The court below did not come to its conclusion by independently applying a legal standard to the evidence in the record. Rather, it came to its conclusion after determining that some of the district court's findings about the import of the extrinsic evidence were not supported by the record.[3] *Icicle Seafoods* expressly reaffirms the authority of appellate courts to review the findings of lower courts in this manner. See slip op. 5 ("If [the appellate court is] of the view that the findings of the District Court [are] 'clearly erroneous' within the meaning of Rule 52(a), it [may] have them set aside on that basis.").

b. Petitioners' contention (Pet. 19-21) that, because the insurance policy was issued by a government agency, this Court has a special responsibility to arbitrate the coverage dispute is equally unfounded. Federal agencies enter into a multitude of contracts. Congress has established specialized trial and appellate tribunals (such as the

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[3] Petitioners' assertion (Pet. 15-16) that the "Appeals Court never mentioned any of the factual findings of Judge Eisele, and did not discuss or analyze them," is sophistic. The court of appeals plainly reviewed the entire record in this case. Then, "[h]aving considered the language of the insurance policy and the extrinsic evidence bearing on the parties' intent concerning the nature and extent of coverage, the minuscule premium paid and [petitioners'] rejection of an opportunity to purchase insurance relating to confiscation of equ[i]pment at a much higher price," the court concluded "that the district court erroneously interpreted the policy" (Pet. App. 21a-22a). As noted in text, we think that the court was resolving an issue of law when it made this statement and, therefore, that it had no reason to address the district court's particularized factual findings. But even if the court were thought to be resolving a factual question, it did not have to discuss each of the district court's subsidiary findings. Rather, it had only carefully to review the record and to determine whether the district court's ultimate factual finding—its evaluation of the import of the extrinsic evidence—was clearly erroneous. See *Anderson* v. *Bessemer City*, 470 U.S. 564, 581 (1985) (Powell, J., concurring). The court below clearly did so.

Federal Circuit) to ensure that these contracts are uniformly and consistently interpreted. Congress has never suggested that this Court has a special responsibility to resolve disputes concerning the coverage of Eximbank insurance contracts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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